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STATE FOR EB/TPP/MST/IPC-BSOILA AND EAP/ANP-DRICCI
STATE PLEASE PASS TO USTR FOR EBRYAN AND KHAUDA
COMMERCE FOR 4530/ITA/MAC/AP/OSAO/ARI BENAISSA
COMMERCE PLEASE PASS TO USPTO-ACOTTON

E.O. 12958: N/A
TAGS: [KIPR](#) [ETRD](#) [NZ](#)
SUBJECT: USE OF TERM BOURBON BY NEW ZEALAND PRODUCER

REF: STATE 12833

¶1. In response to reftel, post contacted New Zealand government officials regarding a New Zealand company that is manufacturing and selling a spirit called "OLD BUSMAN with a logo stating "Pot-stilled by Bourbon NZ Ltd." The Distilled Spirits Council of the United States (DISCUS) is concerned about this use of the term "Bourbon" on a product not made in the United States. Based on discussions with officials at the New Zealand Ministry of Economic Development, Commerce Commission, Food Standards Australia and New Zealand, and the New Zealand Food Safety Authority, post has learned the following:

¶2. The officials see this case as a matter for private action: DISCUS could take the New Zealand "bourbon" maker to court and seek an injunction. Such action could be brought under Section 9 of the New Zealand Fair Trading Act 1986, which prohibits conduct in trade that is misleading or deceptive or is likely to mislead or deceive. Action also could be pursued under a claim of "passing off," which essentially is trading on the reputation or goodwill of another product. Passing off has no statutory base but arises from common law. While the act and "passing off" are similar in application, they exist independently in law.

¶3. The case "Wineworths Group Limited v Comite Interprofessionnel du Vin de Champagne (1992) 2 NZLR 327" might be most relevant. The court ruled in favor of French Champagne makers against a New Zealand agent for an Australian company making an "Australian Champagne." The French Champagne makers made two separate claims, one under the Fair Trading Act and the other under the tort of passing off. The court rejected the claim under the act, but ruled for the French Champagne makers on the ground of passing off, based on Champagne's reputation in New Zealand as a French product. Post will send addressees a copy of the judgment via e-mail. Counsel for the champagne producers were Julian Miles QC of Auckland and Jack Hodder, a partner at Chapman Tripp in Wellington.

¶4. Should the government enact the Geographical Indications (Wine and Spirits) Registration Bill, New Zealand would have the capacity to register Bourbon as a geographical indication. The bill, introduced into Parliament in June 2005, had its first reading in Parliament and was referred to the Select Committee on Foreign Affairs, Defense and Trade in December 2005. The committee invited public comments on the bill until February 3.

¶5. Meanwhile, there is scope for geographical indications to be protected in New Zealand under the Trade Marks Act 2002. A GI potentially could be registered as a collective or

standard mark if it met the criteria for such a mark and were not descriptive. However, because geographical terms usually are considered descriptive, most GIs would not meet that requirement. A GI could be registered as a certification mark even if it were descriptive, if it could be shown to be used in the market and seen as distinctive. Thus, a certification mark for Stilton cheese is registered in New Zealand.

¶6. The Food Standards Code of Australia and New Zealand, Part 2.7.5 on "spirits," was established to give effect to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It protects geographical indications that represent "a given quality, reputation or other characteristic of the product which is essentially attributable to its geographical origin." It does not specifically mention "Bourbon." The code says that a GI must not be used in relation to a spirit unless "the spirit has been produced in the country, locality or region indicated." However, the food standards code could not be used to enforce protection of a GI until the Geographical Indications (Wine and Spirits) Registration Bill were passed, allowing GIs to be registered in New Zealand. The New Zealand Food Safety Authority is empowered to investigate complaints and would be able to take a producer to court over infringement of the food standards code. Part 2.7.5 of the code can be accessed via the link: http://www.foodstandards.gov.au/_srcfiles/fsc_2_7_5_Spirits_v78.doc.

¶7. The Commerce Commission, New Zealand's competition watchdog, does not consider this a matter that it would pursue because it does not meet the Commission's screening criteria. A Commission representative said it would be

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difficult to comment on the likely success of a court case, under Section 9 of the Fair Trading Act or on the ground of passing off, because the Commission does not know enough about how Bourbon is viewed by consumers in New Zealand.

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